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No. 90-1769

In the Supreme Court of the United States

OCTOBER TERM, 1991

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

BOSTON AND MAINE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondent's principal contention is that the decision below turns on the court's view that the ICC failed to engage in sufficient factfinding. Br. in Opp. 9, 12-16, 20. That contention seriously mischaracterizes what the court of appeals held. The court made unmistakably clear that it was engaged in the business of construing Section 402(d) of the Rail Passenger Service Act of 1970 (RPSA), 45 U.S.C. 562(d), and, in particular, deciding whether Amtrak's reconveyance of condemned property was inconsistent with Section 402's requirement that the property condemned be "required for intercity rail passenger service." The court itself framed the issue as "whether Amtrak has the authority to use section 402(d) to effect a change in ownership of rail lines between other parties," and it answered that question by holding that "the Act does not permit Amtrak to take

property by eminent domain for which it concededly has no need itself." Pet. App. 15a.

The court removed any doubt about the nature of its inquiry by explaining that it did not defer to the ICC's interpretation of Section 402(d) under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) because, "[o]n examining the language and history of subsection (d) and the structure of section 402, we conclude that its meaning is unambiguous." Pet. App. 16a. And the court articulated its holding by stating that "the Commission's construction of the statute is contrary to its unambiguous meaning"; more specifically, "the Commission's construction of the phrase 'required for intercity rail passenger service' contravenes the plain meaning of section 402(d) as it allows the taking of property that was neither needed nor even wanted by Amtrak." *Id.* at 23a.

Those statements cannot be explained as critiques of an agency's factfinding; they plainly reveal that the court determined an issue of law involving the interpretation of Section 402(d) of RPSA. In her concurrence, Judge Ruth Ginsburg underscored that point by refusing to join "the precedent-setting construction of the statute decreed by the majority opinion." Pet. App. 24a. Under the court's holding, Amtrak cannot invoke Section 402(d) when its purpose in condemning rail property is to effect a transfer of a rail line to another private railroad. Pet. App. 17a. It is that conclusion of law that our petition challenges.

In suggesting that the decision below turns solely on the ICC's factfinding, respondent relies primarily (Br. in Opp. 12-14) on the court of appeals' alternative holding, in which the court concluded that the ICC had not adequately supported its determination that Amtrak's "need" for respondent's property was established under Section 402(d)(A) and (B). Pet. App. 3a, 18a-21a. Although respondent's discus-

sion of the opinion obscures the point, that alternative holding does not detract from the breadth of the court's major conclusion, which is that the phrase "required for intercity rail passenger service" in Section 402(d) is incompatible with Amtrak's reconveyance of condemned property *in all cases*.[1]

In any event, respondent is also wrong in treating the alternative ruling as a routine example of judicial review of an agency's findings. In fact, the court's alternative ground rests on a fundamental misunderstanding of the statute's requirements. As we explain in our petition (Pet. 20-21), the court stated that the ICC erred in holding that the conveyance of respondent's line to Amtrak would not "significantly impair the ability of [respondent] to carry out its obligations as a common carrier." 45 U.S.C. 562(d)(1)(A). In the court's view, "[t]he statute provides that the Commission's finding on impairment [must] focus on the 'conveyance of the property to [Amtrak]' and not on post-hoc remedies aimed at ameliorating the impairment." Pet. App. 19a. But the ICC determined that the statute permits it to consider, in evaluating impairment, such "post-hoc remedies"; indeed, the ICC explained that because respondent "has the option of retaining its local traffic through a trackage rights agreement" offered in conjunction with the condemnation, respondent's "ability to carry out its com-

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[1] The court made the point crystal clear in its order denying rehearing, where the court noted that "the property that is subsequently conveyed may not be condemned in the first place if it is not 'required for intercity rail passenger service.' *The court construed section 402 to preclude Amtrak from resorting to its subsection (d) power to effect an outright change in ownership between competing railroads* if it could instead achieve the objective necessary for passenger service by taking a lesser interest or by using its subsection (a) power." Pet. App. 3a (emphasis added).

mon carrier obligations * * * will not be impaired." Pet. App. 46a. Those statements make clear that the nub of the disagreement between the court and the Commission is not about the adequacy of the ICC's fact findings, but about what sort of facts the statute permits the ICC to consider. That is a legal issue ripe for this Court's review.[2]

2. Respondent also fails to come to grips with Congress's amendment of Section 402(d), while the rehearing petitions were pending, to clarify that Amtrak "may subsequently convey title or other interest in [condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of this Act." Independent Safety Board Act Amendments of 1990 (ISBA), Pub. L. No. 101-641, § 9, 104 Stat. 4658. As our petition explains (Pet. 23-24), there is no sensible construction of this amendment other than to read it as a direct overruling of the court of appeals' interpretation of Section 402(d). The court of appeals' refusal to give effect to this Act of Congress constitutes egregious error.

In responding, respondent again seeks refuge in the suggestion that the court of appeals determined only that "the

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[2] Respondent's unexplained assertion (Br. in Opp. 16) that the decision below is unworthy of review because it is "interlocutory" is wide of the mark. In light of the court of appeals' legal determinations, the remand of the case to the Commission cannot result in further determinations that would either clarify or obviate the need for deciding the questions presented in the petition for certiorari. The Court has frequently reviewed court of appeals decisions remanding cases to an agency in analogous situations. See, *e.g.*, *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1162 & n.2, 1163 n.3 (1991) (Court granted certiorari to address court of appeals' interpretation of 49 U.S.C. 11341(a) notwithstanding that court's remand to agency for determination of other issues); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 537 (1978) (Court granted certiorari despite court of appeals' remand to the agency).

Commission is required * * * to make adequate findings to support the use of the eminent domain power," and asserts that the amendment did not overturn the court's conclusion that the ICC had not done so. Br. in Opp. 18. But, as we have shown, respondent's description of the decision below as resting on the alleged inadequacy of the ICC's findings is untenable, and, apart from that suggestion, respondent has no answer to our reliance on ISBA. Indeed, respondent concedes (albeit grudgingly) the main point about the amendment, namely that it "may affect the majority's conclusion that Section 402(d) does not authorize Amtrak to convey condemned railroad property to a third party." Br. in Opp. 18. That concession is well advised; the conclusion is inescapable that the amendment directly overturns the majority's reading of the statute to forbid the transaction at issue here. No other purpose for the amendment can be imagined; respondent does not even attempt to suggest one.[3] Particularly in light of respondent's virtual concession that the amendment repudiates the central ruling of the court of appeals—and thereby allows Amtrak to condemn rail property for the purpose of reconveying it—the flawed ruling below should not be allowed to stand.[4]

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[3] Respondent slights the amendment on the theory that because "meaningful" legislative history is absent, "the language of the 1990 Amendment plainly has no effect on this aspect of the ruling of the court of appeals." Br. in Opp. 18. This Court, however, does not subscribe to the view that "a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988). In any event, Congress could hardly have made its purpose more plain in the legislative history than it did: the objective was to reverse the court of appeals' erroneous interpretation of Section 402(d) in its initial opinion. See Pet. 22-23.

[4] We note in our petition that the Court may wish to consider summary reversal of the judgment in this case. Pet. 28. Respondent's failure to offer any plausible interpretation of ISBA different from ours reinforces that suggestion.

3. Finally, respondent asserts that our description of the impact of the decision below on Amtrak's operations is "exaggerated," "unfounded," and "provides no justification for review by this Court." Br. in Opp. 19. Respondent supports its claim by noting only that Amtrak had not previously invoked its powers under Section 402(d) to reconvey condemned property. *Ibid.* Although Amtrak has not needed to exercise its Section 402(d) powers in the past as it did in this case, the very existence of those powers plays an important role in facilitating negotiated settlements. As is suggested by Congress's prompt rejection of the decision below, the nullification of that option by the court of appeals is viewed by Congress as threatening seriously to impede Amtrak's relationship with the freight railroads in the future. Because Amtrak must renegotiate many trackage rights agreements in the next few years, it is vital that Amtrak not be at the mercy of those freight railroads that, for any reason, might prefer not to provide Amtrak reasonable access to their track systems, or to maintain them in a suitable condition.[5]

Although respondent seeks to downplay the importance of this case, Congress's swift action to overrule the court of appeals' construction of the statute attests to the significance that Congress ascribes to Amtrak's condemnation power. In cases of statutory construction, this Court has often remarked that if Congress is not satisfied with the judiciary's interpretation, it is free to alter what the courts have done. See, *e.g.*, *Patterson* v. *McLean Credit*

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[5] Respondent suggests in passing (Br. in Opp. 19 n.5) that Montrealer service would not be imperiled if ownership were to revert to respondent. That statement ignores the need for *ongoing* maintenance of track, and respondent's demonstrated history of failing to maintain the track. It would be a sheer waste of the several million dollars that Congress appropriated for the track's rehabilitation if ownership were returned to respondent, and respondent again allowed the track to deteriorate.

Union, 491 U.S. 164, 172-173 (1989). Because of the court of appeals' extraordinary failure to respect Congress's exercise of that power in this case, and because of the adverse consequences of the decision below for Amtrak and the public, this Court's review is warranted.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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*Acting Solicitor General**

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* The Solicitor General is disqualified in this case.

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